

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-203

WILLIE KING, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

Petition for a Writ of Certiorari to
the United States Court of Appeals for the
Fifth Circuit

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IN THE SUPREME COURT OF THE UNITED STATES

Term, 1976

No. _____

WILLIE KING, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

Petition for a Writ of Certiorari to
the United States Court of Appeals for the
Fifth Circuit

Petitioner prays that a Writ of Certiorari issue to review the judgment herein of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on June 1, 1976, Petition for Rehearing denied on July 12, 1976.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported. It affirmed a judgment of conviction of your petitioner for conspiracy to engage in the business of

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dealing in fire arms without being licensed to do so in violation of 18 USC Section 371. Petitioner was tried in the District Court by a jury and there is no opinion of that court.

JURISDICTION

The judgment of the United States Court of Appeals was entered on June 1, 1976, Petition for Rehearing was denied on July 12, 1976. Jurisdiction of this Honorable Court is invoked under 28 USC Section 1254 (1).

QUESTIONS PRESENTED

1. Did the court below err in holding that the evidence produced at the trial of Respondent Willie D. King was sufficient to sustain conviction of conspiracy, when it is apparent from the opinion below that the court found inconsistent facts and found a conflict in the evidence where there

was no conflict?

2. Did the court below err in holding that the trial court was correct when it failed to grant a mistrial after stating, in the presence of the jury, ". . .because all three of the defendants were apparently involved in some way in that. . .?"

3. Your petitioner submitted on appeal below that he was denied effective assistance of counsel and due process of law by the trial court when the trial court assisted in the prosecution of the case. These assertions were not reached by the court below.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fifth Amendment, United States Constitution;

"No person shall. . .be deprived of life, liberty, or property, without due process of law. . . ."

2. The Sixth Amendment, United States Constitution;

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, . . . and to have the assistance of counsel for his defense."

3. The statute under which the petitioner was prosecuted, was 18 U.S.C. 922(a) (1) which provides as follows:

"Section 922. Unlawful Acts

(a) It shall be unlawful-

(1) for any person, except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms or ammunition, or in the course of such business to ship, transport, or receive any firearm, ammunition in interstate

or foreign commerce;"

4. Additionally your petitioner was tried and convicted under the conspiracy statute of violating the above described statute. The conspiracy statute being 18 U.S.C. 371 which provides as follows in part:

"Section 371. Conspiracy to commit offense or defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, one or more such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 nor imprisoned for more than five years, or both."

STATEMENT

On May 20 and 21, 1975, the petitioner

Willie D. King and his two cousins, Tellis Jones and Fred Lee Jones, were tried by a Federal traverse jury in the United States District Court Middle District of Georgia, Thomasville Division, for the felony offenses of engaging in the business of dealing in firearms without being licensed to do so under the provisions of 18 U.S.C., Section 922(a) (1) and 924 (a); and for conspiracy to do the above described felony in violation of 18 U.S.C., Section 371.

After a two day trial, the jury returned a verdict of guilty on the charge of conspiracy and not guilty on the substantive offense of illegally dealing in firearms. Your appellant was sentenced by the presiding judge to serve one year and a day confinement in federal custody.

The co-defendants, were each convicted of the substantive charge and the conspiracy charge.

The evidence in this case as presented

at trial against Willie D. King is as follows:

That the signature "Willie D. King" appear on certain Government exhibits known as the firearm transaction records form number 4473. There were ten of these forms each representing the supposed purchase of a firearm by a person signing the words "Willie D. King". All of these forms were filled out and the attendant purchases were made between November 1, 1969 and March 22, 1974. All of the forms were prepared by C. Lamar Hatcher, the owner of the sporting goods store where the guns were sold.

Seller of the guns, C. Lamar Hatcher, did not, and implied that he could not, identify petitioner Willie D. King. Furthermore, the gunseller had no independent recollection of having sold Willie D. King any guns and particularly he did not have any independent recollection of having sold

Willie D. King the two guns he was supposed to have bought on March 22, 1974. The principal gun in question was Exhibit G-180 and that gun had the same description as that that appeared on Government Exhibit G-156B which was a form 4473 dated March 22, 1974 that had the words "Willie D. King" signed upon it.

Also on March 22, 1974 while looking for defendant Fred Lee Jones at a parking lot, undercover agent Joseph Forbes asked Willie D. King if he had seen co-defendant Tellis Jones. Willie D. King informed him that Tellis Jones was gone and that Tellis' brother, Fred Lee Jones, was looking for Agent Forbes. Your petitioner also told Agent Forbes that Fred Lee Jones had a pistol for him. The agent was appraised of the fact that Fred Lee Jones could probably be found at the Donaldsonville Police Station where the

agent indicated that he did not want to go. Petitioner King offered, and did go with Agent Forbes, to the Donaldsonville Police Station in a truck. Upon arriving at the police station Willie D. King identified co-defendant Fred Lee Jones, and alighted from the truck, and after a short conversation with Fred Lee Jones, Willie D. King went to Fred Lee Jones' truck, got a paper sack, and returned to Agent Forbes and gave him the sack, the sack contained a .22 revolver identified as G-180.

The Government's handwriting expert, Philip A. White, was called on direct examination by the appellant Willie D. King. He testified, unequivocally, that in his expert opinion Willie D. King did not sign form 4473, Exhibit G-156B, dated March 22, 1974. He testified further that Willie D. King did not sign form 4473,

Exhibit G-166A dated March 22, 1974.

The court below in its opinion found that there was sufficient evidence to show that Willie D. King purchased Government's Exhibit G-180. This is essential for unless Willie D. King had purchased this particular .22 revolver the evidence becomes insufficient to tie him to this conspiracy. The problem with the court's finding of fact below is that there is no evidence to support that finding of fact and a great deal of evidence unequivocally supports the position that Willie D. King did not buy the gun that was in the sack that was delivered to Agent Forbes.

In the midst of the trial the court commented upon the evidence so as to state to the jury, in the midst of another comment, that all three of the defendants were apparently involved. This comment constituted the most conclusive evidence against

your petitioner.

REASONS FOR GRANTING THE WRIT

1. The court below clearly states that there was evidence at trial that is not borne out by the record. The court below erroneously found specifically that your petitioner purchased the gun that was in the paper sack that he, your petitioner, handed to the undercover agent. There is no evidence that your petitioner signed the form 4473 that was identified to the gun in the sack.

If your petitioner did not buy the gun that was handed to the undercover agent, that was supposedly sold by Fred Lee Jones to the undercover agent, then the nexus is too weak to bind this appellant to the conspiracy. The evidence then becomes insufficient to sustain his conviction.

The Government must not be allowed to sweep persons into conspiracy dragnets with

documentary evidence of the quality submitted at trial against Willie D. King.

2. The opinion below is in conflict with decisions rendered in the Fifth Circuit Court of Appeals specifically Johns v. the United States, 195 F.2d 77 (5 Cir. 1952); Duke v. United States, 233 F.2d 897 (5 Cir. 1956); United States v. Amato, 495 F.2d 545 (5 Cir. 1974); Causey v. United States, 352 F.2d 203 (5 Cir. 1965).

Additionally the case at bar is in conflict with the principles as set out in the cases of Van Huss v. United States, 197 F.2d 120 (10 Cir. 1952); Goodman v. United States, 128 F.2d 854 (9 Cir. 1942); Ong Way Jong v. United States, 245 F.2d 392 (9 Cir.).

Likewise the decision in this case is also in conflict with the case of United States v. Falcone, 311 U.S. 205, 61 S.Ct. 204 (1940).

The very distinct problem suffered by casual bystanders who happen to move on the edge of ongoing conspiracies must be recognized; otherwise, innocent persons may be more easily drawn into the Government's dragnets. The Second Circuit has enunciated a fair rule that needs to be considered by this court. They have said:

" For a single act to be sufficient to draw an actor within the ambit of a conspiracy to violate the Federal Narcotics laws, there must be independent evidence tending to prove that the defendant in question had some knowledge of the broader conspiracy, or the single act itself must be one from which such knowledge may be inferred." (Citations omitted) United States v. DeNoia, 451 F.2d 979 (2 Cir. 1971).

Without the conclusion that the respondent in this case purchased the gun he handed to

the undercover agent his case falls squarely under this one transaction rule.

3. The opinion below is in conflict with the Constitution in that the trial court judge, by his comments on the evidence, effectively denied your petitioner due process of law as guaranteed by the Fifth Amendment of the Constitution and effective assistance of counsel, as guaranteed by the Sixth Amendment to the Constitution. These denials of basic constitutional rights were effectuated when the trial court told the jury that all three of the defendants were apparently involved in the matter. The court's comment, as more fully set out in footnote 3 of Appendix A, was so highly prejudicial that it was incapable of being cured by any instruction.

The case at bar is in conflict with yet another case decided by the Fifth Cir-

cuit. The court below failed and refused to follow the mandate as set out in the case of The United States v. Musgrave, 444 F.2d 755 (5 Cir. 1971). As stated in that case, as matter of judicial notice, juries are highly sensitive to everything they hear the judge say at the trial. It is for this reason that trial courts must be careful.

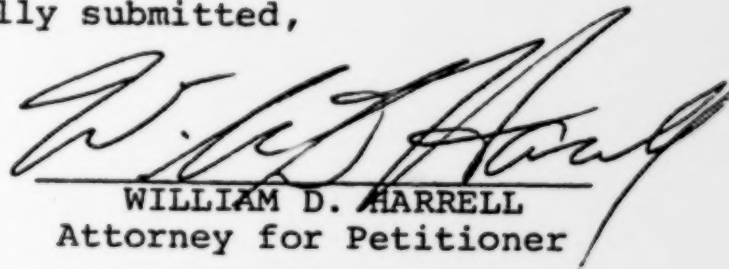
The opinion below does not grasp the point enunciated so clearly in Musgrave, supra. The question is not; "did the judge say that he had no opinion or that he had expressed no opinion about whether any overt act had been proven or not?", the question is; "having made a statement--that at the very least has the appearance of expressing an opinion--is the judge required to tell the jury that they are not bound by the court's opinion?". In this case the court failed at any time to

make it clear to the jury that they were not bound by the court's opinion as to Willie D. King's "apparent involvement" in the alleged conspiracy. It is clear from reading the transcript that the judge believed that Willie D. King was "apparently involved" and the trial judge very effectively conveyed that opinion--albeit it accidentally--to the jury. This was error. The error was brought to the court's attention when it happened. The error could have been cured at that time. The error could have been cured in the charge to the jury. The error was not cured and your petitioner suffers therefrom.

CONCLUSION

The Petition for Writ of Certiorari
should be granted.

Respectfully submitted,



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APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Willie D. KING, Fred Lee Jones and
Tellis Jones, Defendants-Appellants.

No. 75-2840.

United States Court of Appeals,
Fifth Circuit.

June 1, 1976.

Appeals from the United States Dis-
trict Court for the Middle District of
Georgia.

Before DYER and CLARK, Circuit Judges,
and KRAFT*, District Judge.

KRAFT, District Judge:

Appellants, Willie D. King (King)
Fred Lee Jones and his brother, Tellis
Jones, were charged with (1) conspiracy to
engage in the business of dealing in fire-
arms without being licensed to do so,¹ and
(2) having engaged in that business with-

out a license.² The Jones brothers were convicted of the substantive charge and all three appellants were convicted of conspiracy.

Two issues are raised by all appellants, one issue by two appellants and the remaining issues are separately raised only by Tellis Jones. We shall deal first with the issues commonly raised.

(1) The first contention made by all three appellants is that the evidence was insufficient to support the verdicts. We disagree. If, taking the view most favorable to the Government, there was substantial evidence to support the verdicts, they must be sustained. Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942).

From our full review of the evidence it is apparent that the jury was warranted in finding the following facts: Fred Lee Jones, a policy sergeant in Donaldson-

ville, Georgia, and his brother, Tellis Jones, were cousins of King. Tellis Jones and King were usually employed outside Donaldsonville, either on the premises of Action Movement Fund or the nearby premises of Action Movement, Inc. The Fund had been founded by Dr. Dallas Moore, an uncle of the Jones brothers and a purported spiritual healer, who conducted his services, as or under the auspices of, Action Movement, Inc. Dr. Moore's services attracted substantial numbers of people, many of whom came by bus from other states, including New Jersey and New York. For food and shelter the visitors frequently used facilities available through Action Movement Fund. The existence of a bus station, a parking lot and the frequent presence of large numbers of strangers in this rural setting provided a ready entree for the undercover agents of the Alcohol,

Tobacco and Firearms Bureau (AT&F) in their investigation of the suspected unlawful activities of the appellants.

Between March 17, 1969 and November 29, 1974 Tellis Jones purchased more than ninety firearms. From February 25, 1971 to November 22, 1974 Fred Lee Jones purchased more than sixty firearms. Between November 1, 1969 and March 22, 1974 King bought at least eight firearms. Most of these purchases, mostly handguns of various calibers, were made from Hatcher's, a sporting goods store in Donaldsonville.

One of the handguns purchased by Tellis Jones on May 28, 1969 was seized by police in Newark, New Jersey in August, 1970. Another, purchased by Tellis Jones on July 18, 1972, was seized by police in the same city later that year. Two handguns purchased by Fred Lee Jones on successive days in October, 1973 were seized

by police in Rochester, New York in December of the same year.

On February 11, 1974 Tellis Jones assured Joseph Forbes (Forbes), an undercover agent of AT&F, in response to the latter's inquiry that guns were easy to procure and that he could get them for Forbes in Donaldsonville. Forbes then arranged to buy two .25 cal. automatic pistols, paid Jones his quoted price of \$80 and agreed to meet Jones, as the latter requested, in the early afternoon. When they met, as arranged, Jones gave him two .25 cal. automatic pistols and requested an additional \$20, which Forbes paid. In parting, Forbes expressed his intention to return in about a month to pick up more guns. Jones quoted him a price of \$140 on a .44 cal. magnum and told Forbes to write him or call him at a telephone number he then gave Forbes.

Forbes returned on March 21, 1974 and met Tellis Jones about 6:00 P.M. telling him he wanted to get more guns. Jones said it was too late; that everything was closed. He instructed Forbes to meet him the next morning. They met again the following morning at a parking lot near Dr. Moore's house. Jones asked Forbes what type guns he wanted and was told a .357 cal. magnum, a .22 cal. and a .32 cal. Jones made some calculations and said the price would be about \$212. Forbes gave him \$215 and was told to await Jones' return. Jones reappeared about an hour later, told Forbes to wait a moment, went to his truck and came back with a box containing a .357 cal. magnum revolver, which he delivered to Forbes. Jones said he was only able to pick up one gun at the gun shop, because an F.B.I. agent was then in the shop; that he would return to the shop about 1:00 P.M.

and get the other two guns. After a moment or so, Jones walked to another truck, a Ford bearing a fish decal, in which his brother, Fred Lee Jones, was sitting. He returned to Forbes shortly, carrying a small box, which he gave to Forbes. Therein was a .32 cal. revolver. Jones told Forbes that his brother (Fred Lee Jones) would pick up the .22 cal. for Forbes later and that Forbes should remain at the parking lot. Forbes stayed there until about 4:00 P.M. and, not having been contacted by either of the Jones brothers, asked another man (King) in the immediate vicinity if he had seen Tellis Jones. King told Forbes that Tellis had gone, but that Tellis' brother was looking for Forbes and had a pistol for him. Forbes said he didn't know Tellis' brother. King said Tellis' brother was probably at the police station. Forbes indicated his disinclination to go there

and King said he would go with him. Forbes and King went to the police station in Forbes' truck. There Forbes saw Fred Lee Jones, in uniform, sitting in a police car. King alighted from Forbes' truck and walked toward the police car. Fred Lee Jones got out of the police vehicle to meet King and the two conversed for a time. King then walked over to Fred Lee Jones' truck nearby, the Ford with a fish decal, and removed a brown paper bag therefrom. He walked back to Forbes' truck and gave Forbes the bag in which was a .22 cal. revolver. The business records of the sale at Hatcher's indicate that this firearm was sold to Willie D. King on the same day. The evidence was sufficient to support a finding that King was the purchaser, though there was conflicting evidence on the authenticity of his purported signature on the document.

In late March, 1974, Elisha Shepard (Shepard), another undercover employee of AT&F went to the police station in Donaldsonville, seeking Fred Lee Jones. There he met Jones, who wore the uniform and insignia of a police sergeant. Jones accompanied Shepard outside. Shepard told Jones that a fellow from Newark, New Jersey had told him Jones had guns for sale. Jones said "yes". Shepard told Jones he was just out of prison and "didn't want to do no paper work." Jones assured him that he should not worry; that Jones could take care of it. Jones then asked Shepard how many guns he wanted. Shepard indicated two, but stated that he wanted to see them, so he could see just what he wanted. Jones instructed Shepard to follow him. Shepard followed Jones, who was in his police car, to Jones' home. On arrival Jones told Shepard to wait, then entered the rear of

his home, unlocked the front door and invited Shepard in. He showed Shepard two .22 cal. revolvers which Jones said Shepard could have for about \$34.95 a piece. He also showed Shepard a .32 cal. pistol, which Shepard declined because of the price Jones quoted. Shepard inquired about a good .38 cal. revolver and Jones said he would sell him his .38 Smith & Wesson, the service gun Jones was then wearing for \$75. Shepard said he did not want to pay that much, but bought the two .22 caliber firearms from Jones for \$34.95 each. Shepard then told Jones he might want more guns later and inquired how he could contact Jones. Jones told him to contact Jones at the police station and also wrote on a piece of paper a telephone number at which Shepard could call him.

Shepard called the number Jones had given him on January 28, 1975 and talked

with Jones, telling him he wanted to order some guns, two 12 ga. automatic or pump shotguns, a .357 cal. magnum revolver and ten .22 cal. Saturday night specials. Jones said he had to have the money first to enable him to buy the ten Saturday night specials, but said he thought he already had the rest of the firearms on hand. Jones told Shepard to call back later to make sure that Jones was able to get the firearms requested. Shepard called Jones back on the following Friday and was told by Jones that he had all the firearms. Shepard told Jones he was unable to come himself and would send his nephew, Willie, to pick up the guns.

On January 31, 1975, Willie Wright, (Wright) another undercover agent of AT&F, went to Donaldsonville, made a telephone call to the police station and then went there, looking for Fred Lee Jones. He

found Jones outside the police station talking to someone. Fred Lee Jones came over to Wright's car and told Wright he was expecting him. Wright asked "could I cop some weapons, firearms." Jones asked whether Wright was "Willie". Wright said he was. After some further irrelevant conversation, Jones said he had some weapons for sale and instructed Wright to follow him, first to the bus station, then to Jones' house. Upon arrival at Jones' house, Jones opened the trunk of his car and showed Wright weapons that Jones said were for sale, to wit, seven rifles and three handguns. Jones quoted the price for the firearms and Wright pretended he could not remember them all, whereupon Jones wrote them down, together with the prices for other firearms that Jones said he could get for Wright, if the latter wanted to buy them. Wright said he would have to go and get

some money. Wright left and shortly thereafter Fred Lee Jones was arrested.

(2) There was ample evidence that Tellis Jones and Fred Lee Jones had, in concert, been engaged in the business of dealing in firearms for several years and that neither had ever been licensed. The existence of a conspiracy so to engage in that business was a reasonable inference to be drawn from the concert of action. While the evidence against King was substantially less in volume, there was sufficient evidence to enable the jury to find beyond a reasonable doubt that King knew the conspiracy existed and the nature of that conspiracy and that his participation and his acts were intended to further the objects of the conspiracy. See United States v. Morado (5 Cir. 1972), 454 F.2d 167, 175; Causey v. United States (5 Cir. 1965), 352 F.2d 203.

(3) Though all appellants now assert that the denial of the motion for mistrial was error, it is noted that the motion was made only by counsel for Tellis Jones and that the only reason advanced to support the motion was that "Your Honor has commented on the evidence from the bench."

The episode stemmed from the confused and confusing interrogation³ of Brazil, an agent of AT&F, by Tellis Jones' counsel, which the trial judge sought to render comprehensible by accurate reference to the prior testimony of the witness, Forbes, and by the suggestion that counsel frame more specific questions. It is clear that the trial judge meant only that the three defendants were mentioned in Forbes' testimony and nothing more. The charge clearly and explicitly instructed the jurors that they were the sole judges of the witnesses' credibility; that, in making reference

to any evidence, the trial judge was expressing no opinion and that the facts were solely for the jury's determination. The trial judge properly and adequately fulfilled his role. See United States v. Jacquillon (5 Cir. 1972), 469 F.2d 380, 387.

Two of the appellants, King and Tellis Jones, next contend that the trial judge abused his discretion in ruling that a prospective expert witness, David Anderson, did not qualify as a "handwriting expert".

The record reveals that Anderson was employed full time by the Social Security Administration in a job unrelated to handwriting. He had taken a correspondence school course in "handwriting analysis", had done such analysis daily as self-study, had no laboratory and trained under no one. Rather than being an "examiner of questioned documents", in the commonly accepted sense,

the proffered witness purported to possess expertise in discerning the character or type of a person from that person's writing, not the identity of the scrivener.

(4,5) The preliminary determination whether Anderson qualified sufficiently to enable him to testify as an expert and, so, to express his opinion, was for the trial judge in the exercise of his sound discretion. De Freese v. United States (5 Cir. 1959), 270 F.2d 737. We conclude that the discretion of the trial judge was properly exercised. We also note, in passing, that the government's handwriting expert, who had examined the questioned documents and of whose exculpatory conclusions the appellants' counsel had been apprised by the government, was present, was made available to and was called by appellants as their witness.

We next review of the contention of

the appellant, Fred Lee Jones, that the district court erroneously denied his motion to suppress.

The question, which initially involved the extent of the jurisdiction of the state court judge, who issued the search warrant, is now moot, because, during appellant's trial, the trial judge excluded the evidence sought to be suppressed upon appellant's objection on other grounds.

(6) Finally, we consider the several contentions made only by appellant, Tellis Jones. The first of these assails 18 U.S.C. Sections 922 (a) (1) and 924 (a) as violative of appellant's rights under the Second and Fifth Amendments to the Constitution.

With the argument that the statute violates appellant's right to keep and bear arms we firmly disagree. He was neither charged with nor convicted of keeping and bearing arms. He was charged with

and convicted of engaging, without a license, in the business of dealing in firearms and of conspiring with others so to do. See United States v. Miller, 307 U.S. 174, 59 S.Ct. 816, 83 L.Ed. 1206 (1939); United States v. Day (6 Cir. 1973), 476 F.2d 562.

(7) We are unimpressed, as well, by his argument that the terms "dealer" and "dealing in", as employed in the statute, are too vague and indefinite to constitute a valid criminal statute, because no standards are established as to the number of sales, dollar volume thereof, a fixed or other place of business or number of employees. "Business" is commonly understood to mean an activity engaging some of one's time, attention and effort and performed in expectation of profit or other benefit; "Dealing in firearms" is commonly understood as selling and/or trading in

firearms, as well as acquiring firearms for sale by purchase and/or trade. United States v. Williams (8 Cir. 1974), 502 F.2d 581; United States v. Day, *supra*; United States v. Gross (7 Cir. 1971), 451 F.2d 1355; United States v. Powell (8 Cir. 1975), 513 F.2d 1249.

(8) Tellis Jones next claims that, absent an interstate nexus, Congress exceeded its power in enacting 18 U.S.C. Sections 922(a)(1) and 924(a), and that, moreover, the evidence established no interstate nexus. We hold that the enactment was constitutional and that no evidence of an interstate nexus was required. United States v. Nelson (5 Cir. 1972), 458 F.2d 556; Mandina v. United States (8 Cir. 1973), 472 F.2d 1110.

(9) Appellant, Tellis Jones, further asserts that the trial court unreasonably limited the length of his attorney's clos-

ing argument to the jury. We find no merit in this claim.

The entire trial took two days. Upon inquiry by the trial judge, Tellis Jones' counsel said he "would like forty five minutes". His brother's attorney said that that time would be sufficient. King's counsel said that that would be more than adequate. The trial judge said "I was thinking about thirty minutes for each of you; and a total of forty five minutes for the Government. He made no order of limitation, nor did he terminate the closing argument of appellant's counsel. Neither at the beginning nor at the end of his argument did appellant's counsel request additional time or indicate, by any application or statement, that he lacked or was deprived of an opportunity fully to present his argument.

Upon careful review of the entire record, we deem the remaining contentions

of appellant, Tellis Jones, without sufficient merit to warrant discussion.

The judgments below are affirmed.

* Senior District Judge of the Eastern District of Pennsylvania, sitting by designation.

FOOTNOTES

1. 18 U.S.C. Section 371.
2. 18 U.S.C. Section 922 (a) and (2).
3. "Q Mr. Forbes said he purchased all of his guns from Tellis Jones, didn't he?
A The first time he was down here he got the guns from Tellis. That is what he told me, yes.
Q Didn't he testify yesterday that he got the others from Tellis as well?
A He made contact with Tellis and he picked up some at the Police Department where he said that Willie King rode with him to the Police Depart-

ment and they went and talked with Freddie and got some guns.

Q That is not what he testified to. Didn't he testify that the guns were purchased from Tellis?

A I don't understand what you are asking, what Forbes told me or what Forbes testified to?

Q I am asking you how many of these guns came to you from a special agent and said he bought them directly from Fred Lee Jones? Aren't these the only two, the two you are talking about a while ago that Mr. Shepard delivered to you?

Mr. Brazil, is that a hard question?

THE COURT: Well, I can understand why he is having a hard time answering the question because I remember the man's testimony. He said that one of the

men went with him to the Police Department, Fred Lee Jones came out, there was a discussion and then somebody went to a truck and got the guns and brought them back. In other words, that is the reason he is having trouble answering the questions because all three of the Defendants were apparently involved in some way in that and I can understand--if you will just ask him a question specifically where he can answer it.

MR. SWEARINGEN: Your Honor, may we have the Jury out. I have a motion to make.

THE COURT: You can make it right now.

MR. SWEARINGEN: We would ask that you would declare a mistrial. We would respectfully submit that Your Honor has commented on the evidence

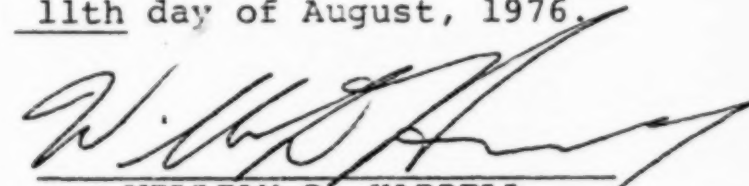
from the bench.

THE COURT: I commented on the evidence to the effect that I want Counsel to ask the Witness a question specific in light of the evidence that has been heard so that he can answer it. That is--I commented on it to that extent."

CERTIFICATE OF SERVICE

I, William D. Harrell, do hereby certify that I have this day served Ronald T. Knight, Esquire, United States District Attorney, at P. O. Box U, Macon, Georgia 31202, three true and accurate copies of the foregoing Petition for Writ of Certiorari by depositing same in the United States Mail with sufficient postage thereon to insure delivery thereof.

This the 11th day of August, 1976.


WILLIAM D. HARRELL
Attorney for Petitioner

Nos. 76-203 and 76-346

Supreme Court, U. S.
FILED

NOV 4 1976

MICHAEL ROBERT JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

WILLIE D. KING, PETITIONER

v.

UNITED STATES OF AMERICA

FRED LEE JONES, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITIONS FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-203

WILLIE D. KING, PETITIONER

v.

UNITED STATES OF AMERICA

No. 76-346

FRED LEE JONES, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITIONS FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App.)¹ is reported at 532 F. 2d 505.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 1976, and a petition for rehearing was denied on

¹Unless otherwise noted, "Pet." refers to the petition in No. 76-346.

July 12, 1976. The petition for a writ of certiorari in No. 76-203 was filed on August 11, 1976. On August 13, 1976, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari in No. 76-346 to and including September 10, 1976, and the petition was filed on September 7, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to sustain petitioner King's conspiracy conviction.
2. Whether the district court improperly commented on the evidence.
3. Whether the court of appeals erred in dismissing as moot petitioner Jones' claim that certain firearms were illegally seized, in view of the district court's refusal to admit the evidence at trial.

STATEMENT

After a jury trial in the United States District Court for the Middle District of Georgia, petitioners and co-defendant Tellis Jones were convicted on one count of conspiracy to engage in the business of dealing in firearms without being licensed, in violation of 18 U.S.C. 371. Petitioner Fred Lee Jones and co-defendant Tellis Jones were also convicted on one count of engaging in the business of dealing in firearms without being licensed, in violation of 18 U.S.C. 922(a)(1) and 18 U.S.C. 2.² Petitioner King was sentenced to imprisonment for a year and a day. Petitioner Jones was sentenced to three years' imprisonment on each count, with the sentences to run consecutively. The court of appeals affirmed (Pet. App.).

²Petitioner King was acquitted on the substantive charge.

The evidence at trial is recounted in detail in the opinion of the court of appeals (Pet. App. 17-20). Briefly, it showed that between 1969 and 1974 co-defendant Tellis Jones purchased more than 90 firearms, petitioner Jones purchased more than 60 firearms, and petitioner King purchased at least eight firearms. Most of these weapons had been bought from Hatcher's, a sporting goods store in Donalsonville, Georgia. In February 1974, undercover Agent Joseph Forbes of the Bureau of Alcohol, Tobacco and Firearms bought two automatic pistols from Tellis Jones and told Jones that he would contact him in about a month for more weapons. On March 22, 1974, Agent Forbes again met with Jones and gave him \$215 for the purpose of purchasing three guns. Jones went to his truck, removed a .357 caliber magnum revolver, handed it to the agent, and then walked to another truck, in which petitioner Jones was sitting, and returned with another revolver. Tellis Jones told Agent Forbes that petitioner Jones would pick up the third weapon later in the day and that the agent should wait at that location for his return (Pet. App. 18-19).

About three hours later, after petitioner Jones had not returned, Agent Forbes approached petitioner King and asked if he had seen Tellis Jones. Petitioner King told the agent that Tellis Jones had left, but that petitioner Jones had gotten the pistol and was looking for him. Petitioner King also stated that petitioner Jones was a police officer and was probably at the local police station. When Agent Forbes stated that he was reluctant to go to the police station, petitioner King agreed to accompany him there. The two then drove to the police station, where they spotted petitioner Jones sitting in a police car. Petitioner King went over to the car, spoke with petitioner Jones for a short while, and then walked to petitioner Jones' nearby truck and removed a brown paper bag. When petitioner King returned to Agent Forbes' vehicle, he handed

him the bag, which contained a .22 caliber revolver. Hatcher's business records for the revolver indicated that it had been sold to petitioner King on the same day that it was resold to the agent (Pet. App. 19). In addition, substantial evidence directly implicated petitioner Jones in other firearms sales in March 1974 and January 1975 (Pet. App. 19-20).

ARGUMENT

1. Petitioner King contends (Pet. No. 76-203, pp. 11-14) that the evidence was insufficient to sustain his conviction on the conspiracy charge. The court of appeals correctly concluded, however, that the evidence outlined above, viewed in the light most favorable to the government (*Glasser v. United States*, 315 U.S. 60, 80), was adequate to support the jury's verdict (Pet. App. 20). The proof clearly showed that petitioner King knew that petitioner Jones had obtained a gun for Agent Forbes and that petitioner Jones was looking for the agent. Petitioner King also helped Agent Forbes locate petitioner Jones and, when petitioner Jones was found at the police station, it was petitioner King who removed the gun from Jones' truck and handed it to the agent. Furthermore, the owner of the shop from which the firearm had been purchased testified that he had sold it to petitioner King (Tr. 74-75). Although, as petitioner notes (Pet. No. 76-203, pp. 9-10), a handwriting expert at trial expressed the view that the signature on the firearms transaction record was not that of petitioner King (Tr. 382-383), resolution of this conflict was a matter for the jury.³

³In view of the facts of the present case, the decision below does not conflict with *United States v. Falcone*, 311 U.S. 205, where the Court found that the evidence at trial did not support the inference that the defendant knew of the conspiracy charged. Similarly, there is no conflict with the courts of appeals' decisions cited by petitioner

2. Petitioners claim (Pet. 12-15; Pet. No. 76-203, pp. 14-16) that the trial judge improperly commented on the evidence. The substance and context of the allegedly improper comment are explained by the court of appeals (Pet. App. 20-21 and n. 3), upon whose opinion we rely. As the court observed, the trial judge was alluding not to petitioners' complicity in the conspiracy but to a witness' previous testimony, and he acted within his province by suggesting that a question be clarified and that counsel frame more specific questions. In any event, as the court noted (Pet. App. 21), any possible prejudice to petitioners was cured by the trial court's explicit instruction that the jury was the sole judge of the witnesses' credibility, that the court was expressing no opinion in referring to any evidence, and that the facts were solely for the jury's determination. See *United States v. Jacquillon*, 469 F. 2d 380, 387 (C.A. 5), certiorari denied, 410 U.S. 938.

3. Petitioner Jones claims (Pet. 9-12) that the court of appeals erred in holding that his illegal search and seizure claim was moot. Although the weapons in dispute were excluded at trial because a witness could not adequately identify them, petitioner contends that he was nonetheless prejudiced by their display before the jury and their identification by the witness.

At trial, Willie Wright testified that on January 31, 1975, petitioner Jones had shown him several firearms, which Jones had offered to sell to him. Government counsel then exhibited several firearms and asked Wright if

(Pet. No. 76-203, p. 12), which found that the evidence was insufficient either to show that a conspiracy existed or to support a finding that a particular defendant had knowledge of the conspiracy or knowingly committed an act in furtherance thereof. Furthermore, the court in *Van Huss v. United States*, 197 F. 2d 120, 122 (C.A. 10), found that the evidence was sufficient to support the jury's verdict and affirmed the conviction.

he could identify them as the same weapons petitioner had offered to sell. Wright said that they were the same. After cross-examination concerning Wright's ability to identify the firearms, however, the court sustained petitioner's objection to the admission of the evidence and instructed the jury accordingly. The court also instructed the jurors that Wright's testimony concerning the incident on January 31 could be considered by them (Tr. 216-217).

In view of the trial court's exclusion of the firearms from evidence, albeit on grounds different from those urged by petitioner, and the court's instructions to the jury regarding its ruling, the court of appeals correctly concluded that petitioner was not prejudiced by these events. The damaging evidence against petitioner was the testimony of Wright, the admissibility of which petitioner does not challenge. The jury's brief observance of certain firearms which Wright could not sufficiently identify did nothing to bolster Wright's credibility or otherwise to implicate petitioner further in the crime charged.

CONCLUSION

It is respectfully submitted that the petitions for a writ of certiorari should be denied.

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NOVEMBER 1976.